

Whose Reason or Reasons Speak Through the Constitution? Introduction to the Problematics

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Published online: 2 November 2011

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Abstract In the following paper sources of a constitution are put in question in general, and more specifically, the constitutional culture of the European Union Law is being investigated in-depth with regard to principles of deliberative democracy and rulings of the Court of Justice of the European Union. The change of a law application paradigm as well as the change of a legal systems' nature are taken into account.

Keywords Change of law application paradigm · Democratic legitimization · Deliberative democracy · Multicentric legal systems · Constitution · The Court of Justice of the European Union

1 Introduction

In *A Matter of Principle* there is a well-known Dworkinian division of possible approaches that are to decode the constitution in so-called hard cases. Generally, the “rule-book conception” and the “rights conception” are two different conceptions of the rule of law. The second strategy of resolving constitutional problems is closely related to the Dworkinian theory because it invokes individual moral/human rights and corresponding duties [5: 11, 3] in hard cases instead of a futile semantic analysis of a constitutional text or seeking for bygone intentions of past legislators.

The change of law application paradigm, namely the transition from a syllogistic model to an argumentatively-interpretative (discursive) model, has been adopted in contemporary times. In the latter model, the process of legal application is not so

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much a decision-making characteristic. Rather, the process assumes the form of adjudication under Dworkin's theory, under which a judge must be both socially sensitive and truly participating in the legal culture. Therefore, application of law is not subject to a simple subsumption. It requires recourse to various legal topics and argumentative rules, including the rules of interpretation. This preserves the flexibility of law and takes into account the postulations of such law applications that are responsive to the changing reality. The outcome of an over-formalistic attitude towards legal interpretation may be that the practice of law will not keep pace with the changing reality and that the judgements passed will be unfair.

What is interesting here, it is the area of investigations on which the attention is focused, namely, application of law, especially in hard cases. However, as 20th century philosophy has shown, especially the philosophy of hermeneutical provenance that has its roots in Heideggerian ideas, every disclosure of something at the same time and in the same move hides or covers something else. Accordingly, the inevitable question is what does the Dworkinian answer cover?

Dworkinian theory of *One Right Answer* contributes to the debate on issues concerning public reasons, as well as public philosophy concerning the democratic polity. It seems to support a Rawlsian picture of public reason that is never anti-minoritarian, but in the contrary, it ought to always be pro-minoritarian. The significance of this claim is that recalling citizens' individual rights (or individual moral rights) in the courtroom guards the idea of justice that is inherent to the rule of law from the pure force of the majority in charge. Only balancing the will of the majority and the rights of individuals (and this way of minorities as well) can we create an overlapping consensus among competing ideas in a public sphere. This way we come closer to the aforementioned covered area of Dworkinian thought, to the co-original thesis to the rule of law, which is the idea of popular sovereignty as "a second source of legitimization" [9: 766, 2]. The hidden problem appears to be the problem of the legitimacy of law, namely, its second co-original source, the will of the *demos*. Other words speaking, it is not about any kind of legitimacy but about the one based on principles of a deliberative democracy.

According to one of the best-known definitions, as elaborated by Amy Gutmann and Dennis Thompson, there are four main characteristics of deliberative democracy and *reason-giving requirement* is the most important of them. This requirement equally concerns both citizens and their representatives as deliberation is a reflexive process. The moral basis for this reason-giving process lays in a conviction that "persons should be treated not merely as objects of legislation, as passive subjects to be ruled, but as autonomous agents who take part in the governance of their own society, directly or through their representatives. In deliberative democracy an important way these agents take part is by presenting and responding to reasons, or by demanding that their representatives do so, with the aim of justifying the laws under which they must live together" [8: 3]. But there are many types of justifications and we should ask what kind of justification is required in this fundamental case for democracy. Gutmann and Thompson describe them as reasons that "should appeal to principles that individuals who are trying to find fair terms of cooperation cannot reasonably reject" or "reasons that should be accepted by free and equal persons seeking fair terms of cooperation" [3, 8]. In other words,

the reasons given by citizens and public officials should take the form of *public justifications*. Citizens and officials should also fulfil the second characteristic of deliberative democracy according to which “the reasons given in this process should be *accessible* to all the citizens to whom they are addressed” [8: 4]. This *requirement of accessibility* stresses the necessity of use by officials and citizens such a form of justifications, which is completely comprehensible for all those involved in deliberation.¹ But the ability to express oneself in public deliberation—understood here as a process of mutual reason giving—is not a natural skill possessed by citizens without proper civic education. Since no one is born as a mature citizen, such a citizen needs to be properly educated in a democratic society and prepared to take co-responsibility for the political community. Only then will he or she be able to face up to the demands that are required from citizens by *the liberal principle of legitimacy* according to which “„our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason. [...] All questions arising in the legislature that concern or border on constitutional essentials, or basic questions of justice, should also be settled, so far as possible, by principles and ideals that can be similarly endorsed. Only a political conception of justice that all citizens might be reasonably expected to endorse can serve as a basis of public reason and justification” [16: 137].

However, one may ask whether discussing the problem of the application of law has any relevance to the problem of its legitimacy, except in unacceptable cases like totalitarianism, tyranny, etc. As pointed out by Mattias Kumm, “Competing methodological accounts of how courts should interpret constitutions are grounded in competing conceptions of the role of institutions charged with enforcing the constitution. In this sense, questions of legal methodology are questions of institutional design or questions concerning the interpretation of an institutional role. Debates on legal methodology are typically debates about what courts should do. They are closely connected to arguments about the appropriate function of courts in their relationship to other actors within a particular scheme of institutional division of labour” [10: 283]. In other words, questions of currently discussed issues of judicial activism and passivism should be seen in the broader perspective of legal labour, including law enacting, the institutional settings for the moments establishing the process of the enactment of constitution, and in an ordinary ways of law-making and law-enforcing.

Investigating further, this issue seems to be connected to the other problem, namely the lack of direct European civic institutions (except, of course, for the European Parliament). This is deepened by a wide-spread idea of governance that should replace an ordinary governmental ruling. Based on the New Public

¹ The third characteristic of deliberative democracy is *the requirement of temporary bindingness* according to which public deliberation “aims at producing a decision that is binding for some period of time” and participants intend their discussion to influence a decision the government will make, or a process that will affect how future decisions are made [16: 5]. And the fourth characteristic is *the requirement of provisionality* which states that “although a decision must stand for some period of time, it is provisional in the sense that it must be open to challenge at some point in the future” [16: 6].

Management's underpinnings, which are directed into economic efficiency, "what [the idea of governance] offers the European citizen is neither empowerment nor meaningful political participation. It also distracts attention from the operation of power within the EU—the myriad ways in which EU regulations, norms, and taxonomies not only colonise domestic policy making but function to remove these areas from the realm of democratic decision making" [17: 721].

To put it more clearly, what complicates the abovementioned discourse of law is the multicentric nature of the modern legal system(s). Nowadays, it is impossible not to notice the change in the paradigm of understanding and functioning of law as a system, particularly in its vertical structure. The view on Kelsen's or Hart's monistic perception of the legal system is verified in favour of a multicentric [6, 11, 13] or global legal system [12, 18]. In fact, the classic dynamic-static interrelations between norms are not sufficiently adequate to describe the current legal system(s), both in respect to system-type as well as to a specific system. This is primarily due to the multiplicity of different and relatively independent law-making centres. In this context, we can talk about the multicentric nature of a legal system through the prism of "the geometry of the three levels": national law, the EU law, and the law created under the Council of Europe.

Multicentricity is understood as a *quoad usum* division of powers between the national and EU authorities that results from adopting the principle of the supremacy of the EU law and the primacy of the principle of effectiveness (*effet utile*) of the said law in relation to the national legal orders. What is often pointed out is that the interrelation between the EU law and domestic law is no longer based on the traditionally conceived hierarchical superiority of one system over another, what in the case of a conflict of norms between the EU law with those of national law leads to a derogation of the latter. The principle of the EU law supremacy is manifested in a firm acceptance of the principle of effectiveness, according to which the EU law norms should be applied by the authorities of the Member States also in case of a conflict with the norms of domestic law, including the norms contained in the constitutions of the Member States.

The operation of a multicentric system is based on a logical different from that adopted both in Member States' systems, as well as within the EU law itself, where the hierarchy of the sources of law, the issues of validity, and the hierarchy of the authorities that apply law continue to play a crucial role. It is particularly difficult to talk about preserving hierarchical nature in its current perspective. In case of multicentric, within a single legal order, we deal with the occurrence of many equivalent sources of law that do not form a hierarchical system (the hierarchy of norms). Meanwhile, the thesis of a hierarchical, pyramidal system of law has become widely accepted.

Multicentric of the legal system involves real issues of conflict of law that emerge at the level of the harmonious *quoad usum* operation of the two subsystems (national and European). These two subsystems come to constitute a single legal space. The encountered changes have a particularly significant effect on the application of law by the courts. This is where most problems arise. The source of the difficulties is due to the commitment of the national judge to apply the national, the European, and international law, as well as supranational standards, principles

and rules. The judge should have the ability to identify the standards needed to settle a particular case. He should be able to resolve the conflict between colliding principles or standards. Undoubtedly, this task is complicated by unclear, controversial, and “sensitive” political ties and interrelations between the national and Union law, as well as by jurisdictional disputes between the national and European courts that create the impression of “jurisdictional chaos”.

Another important issue concerns the composition of the public that should be taken into account by the judge: are that *only* national or European citizens and officials should he publicly justify his decisions to? Or is he responsible and morally accountable to a broader spectrum of people? Some decisions may affect people living in countries on distant continents. Gutmann and Thompson call them “moral constituents” and include into this group all people “who are in effect bound by the decisions even though they may not have had a voice in making them” [8: 135]. If judges would be accountable to such a broadly understood moral public, the necessity of fulfilling by judges *the public reasons-giving requirement* and *the requirement of accessibility*, imposed by deliberative democracy, would become even more important and morally binding.

Now, it is seen that the covered moments in Dworkinian theory refer to the other structural parts of the system of law in general: (1) the methodological question of judicial review as the guardian of individual moral/human rights (and duties) is strictly related to the question of (2) the democratic setting of legal institutions of the whole polity under investigation. As the American philosopher states himself “arguments of political principle [which are to be distinguished from arguments from political policy] appeal to the political rights of individual citizens” [5: 11] and no matter what, the value of these rights is found by the addressee him/herself [5: 63]. So, accordingly, respect for political rights of individual citizens is the very precondition (which is followed by others that are no less important) of (3) the real political/civic empowerment of everyone that results (when fulfilled) in public deliberations constituting diverse public spheres, which are in question in case of the EU. That is why at the end of the circle, we are faced with (4), which is the problem of democratic legitimacy of the constitutional norms themselves that enhance substantive meaning of human rights as well.

It reveals to us that, in fact, the problem of intention founding a constitution plays the crucial role when transformed in such a way that involves a notion of will, that is, a notion transformed in a different—because intersubjective—epistemological field. Then the question can be formed accordingly: whose will founds a constitution? In the times of widespread democratic acceptance, at least in the western part of the world, the answer seems to be trivial. That is unless we harness ideas of deliberative democracy to finally transform the question into the following: whose reason or reasons speak through the constitution?

Whose reason or reasons are eventually uttered in a constitution? Citizens’ representatives—elected once every 4 years, whom citizens convey their voice—who seek for *compromises* at legislative bodies while trying more or less adequately to solve most current social problems and up-to date interests (whose interest, in real?). Or perhaps it comes about by expert-lawyers who try to compromise the will of the people with the rule of law as they understand it? Or maybe a government that

works on the front line problems and draws up new laws to comply with different deficiencies of the polity? At the very least, shouldn't citizens' reasons speak through the constitution? However, the last option generates more complicated problems that question the political and constitutional culture. What is the breadth and scope of public debates that would support specific constitutional solutions? Is it sufficient to talk about the reasonable civic choices and decision-making processes? Nevertheless, the citizenry's voice does not have to always be reasonable (if it happens at all, after all citizens may want something other). In that case, what is going then? Should courts, and more precisely, the community of judges, that is the community of reasonably debating interpreters, come as mediators into a dialog with citizens—who have no sufficient institutional, cultural, or legal tools to maintain their standpoint upon the issue in question—and reasonably (perhaps even making some alterations) speak their voice? However, what happens if we come to the conclusion that the rule of law has its own ways and a constitutional text defines the most profound legal terms, and hence, at the end tears itself away from other legal laws (which, after all, express solutions of vital everyday problems) thereby autonomizing itself?

None of the aforementioned questions is simply an academic puzzle that functions as an exercise of intelligence. On the contrary, these questions are all very serious contemporary problems that—at least—the European Union is faced with. The EU, as an unsettled polity [15: 81], has not worked up the proper and specific constitutional culture so far. However, there are some optimistic voices to be found when it comes to judicially creating a constitutional culture where a dynamic perspective is a striking feature. For example, the idea of a constitution beyond the state (CBS) [10], the idea of a multilevel cooperation of the European constitutional courts (*Der Europäische Verfassungsgerichtsverbund*) [19], and the idea of the process of “constitutional synthesis” [7, 14] have all been observed in recent years. From the other side, we still face problems of democratic deficit, problem of forming general public spheres that legitimize the Union's constitutional law and even ordinary law-making. These issues entail a very controversial receipt of judgements made by the Court of Justice of the European Union for both its own rulings, like this concerning fundamental rights in (a not-established) relation to economic liberties [14: 304–306] and exercising constitutional law that lacks democratic legitimacy because any legitimacy is only based on conveying power by Member States to the EU, so it is not a direct and legitimate democratic body.

It should also be noted, as proved by the subject of the problems raised in this study, which the specificity of European law requires to complement the formal-dogmatic method characteristic of the positivist model of researching law with a specific version of legal hermeneutics. The formal-dogmatic method ignores the cultural and communicative dimension. In modern states, which are driven by the rule of law, communicative integration has become a correlate of democratic institutions and rules that govern a democratic society. A communicative vision of a contemporary society serves the purpose of attaining such a condition in which the community of ideas is not something that mechanically forced. Rather, it is the state authentically manifested in the form of understanding and acceptance of the presented arguments. Meanwhile, the cultural dimension is of great importance

because the European law is applied in the internal systems of the Member States by lawyers who were brought up in different legal traditions. Therefore, the problem of the compatibility of different cultures (e.g., statutory law and common law) and the methods of communication are important and closely associated with the process of applying and interpreting the European law.

Hence, the process of law application undertaken by the Court of Justice of the European Union is most appropriately described by the Dworkin's term *chain novel* [4: 228 ff]. The judges of the said Court, when writing the subsequent chapters of their "novel on the European Union and the European law", interpret and *co-create* the cultural and institutional dimension of integration. In other words, by writing this "never-ending story", they fully participate in the culture. In terms of Ronald Dworkin, the law constitutes the result of a complex process of hermeneutic interpretation and it can be in fact realized only through such an interpretation. From such a perspective, the legal culture, including the culture of the European law, is not a ready-made product. Rather, it is merely recognized by lawyers as common meanings and symbols constituted in the discourse. Therefore, some authors qualify the Court of Justice as a specific "Dworkin's adjudication" [1: VI].

The systemic-axiological rules, both at the stage of law-making and application, involve the reference to the axiology of the legal system expressed in the principles of the whole system or respectively separated parts with a particular emphasis on the regulations of a constitutional nature—what in the case of the EU law stands above all for the general principles of law. The general principles of the EU law are derived from the constitutional traditions common to the Member States that constitute a common foundation of the European culture, not just a legal one. They result directly or indirectly from the very constitutional regulations that are in force in the EU Member States and from the international agreements concluded by the Member States, as well as from the founding treaties of the EU itself, in a certain extent. They are in turn "highlighted", formulated, and consolidated by the judicature of the Court of Justice of the European Union.

General principles manifest the interrelations between the supranational legal system and the legal systems of the respective Member States, since they are in fact the most visible example of their mutual "intermingling". This is especially evident when it comes to the protection of human rights and freedoms under Article 6, Sect. 3 of the Treaty on the Functioning of the European Union. We deal with the primary function of systemic-axiological rules when the rule of law is a component of the normative basis of decisions. Accordingly, its function does not rely on verifying the formula reconstructed from other sources, but it constitutes an "equivalent" element of determining the content of this formula. In contrast, systemic-axiological arguments aim first to determine the content of an individual rule contained in the very principle, assuming that it has a normative content (cf. Court of Justice of the European Union (Grand Chamber) Judgment of 19 January 2010, Case C-555/07, *Seda Küçükdeveci v. Swedex GmbH & Co. KG*, ECR 2010, p. 0346). The adjudication, with the use of the general principles applied by the Court of Justice of the European Union, should be treated as a specifically "legitimized" method to ensure axiological efficiency of the EU law application. This follows from the *belief* that its foundations consist of the axiological unity of

the EU law with the international law and the law of the respective Member States, including “unwritten” and “non-EU” sources that would perhaps refer to the aforementioned “moral constituents”. The Court points out that the “original sources” lie in non-EU public international law, including such principles of the Universal Declaration of Human Rights and in the constitutional traditions of the Member States. A result of which is that certain principles of a fundamental importance “pass” from the international law to the law of the European Union, while the latter emphasizes that it is a part of the international community.

However, when “original sources” of constitutional norms that found the semantic and formal room for understanding other legal norms are understood as unwritten (like Plato’s Last Sailing), then one question turns up like a bad penny: whose reason or reasons speak through the constitution?

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